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SERVICE DATE – NOVEMBER 29, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 734

DISPUTE RESOLUTION PROCEDURES UNDER THE FIXING AMERICA'S SURFACE
TRANSPORTATION ACT OF 2015

Decided: November 22, 2016

Digest:¹ After seeking public comment, the Board adopts final rules to implement passenger rail-related dispute resolution provisions of the Fixing America's Surface Transportation Act of 2015.

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: The Surface Transportation Board (Board) adopts final rules to implement passenger rail-related dispute resolution provisions under the Fixing America's Surface Transportation Act of 2015 (FAST Act).²

DATES: These rules are effective on December 29, 2016.

ADDRESSES: Information or questions regarding these final rules should reference Docket No. EP 734 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman, (202) 245-0386. Assistance for the hearing impaired is available through Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Title XI of the FAST Act, entitled "Passenger Rail Reform and Investment Act of 2015," adds to the Board's existing passenger rail adjudicatory

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Fixing America's Surface Transportation Act of 2015, Pub. L. No. 114-94 (signed Dec. 4, 2015).

responsibilities related to the National Railroad Passenger Corporation (Amtrak). Among other things, Title XI includes new provisions involving cost recovery by Amtrak for Amtrak's operation of "state-supported routes" and for the costs allocated to states (including state entities) using the Northeast Corridor rail facilities for their commuter rail operations. As relevant here, Title XI gives the Board jurisdiction to resolve cost allocation and access disputes between Amtrak, the states, and potential non-Amtrak operators of intercity passenger rail service.³ The FAST Act directs the Board to establish procedures for the resolution of certain of these disputes, "which may include the provision of professional mediation services." 49 U.S.C. § 24712(c)(2) & 24905(c)(4).

On July 28, 2016, the Board issued a notice of proposed rulemaking (NPR) (81 Fed Reg. 51,147), seeking comment on proposed rules pursuant to the FAST Act. In the NPR, the Board noted that because it does not have in place a general set of procedural rules to govern the presentation and conduct of proceedings involving passenger rail matters under 49 U.S.C. §§ 24101-24910,⁴ which would include contested matters arising under Title XI of the FAST Act, parties seeking to bring contested matters before the Board should be guided by the Board's existing Rules of Practice (49 C.F.R. Parts 1100-1129), as applicable. However, the potential to offer "professional mediation services" is unique to the authority granted under the FAST Act, and the Board's existing Rules of Practice contain no applicable provisions. Therefore, the Board proposed new regulations to address requests from one or more parties for informal assistance in securing outside professional mediation services pursuant to the FAST Act.

Specifically, the NPR provided that, under a new 49 C.F.R. § 1109.5, parties to a dispute involving the State-Sponsored Route Committee or the Northeast Corridor Commission would be permitted to request the Board's assistance in securing outside professional mediation services by submitting a letter to the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC). OPAGAC would then contact the requesting party or parties in response to such requests within 14 days of receipt of the request to assist in arranging for professional mediation services.

After careful consideration of the comments received, the Board is promulgating a set of procedural rules that adopt and clarify the provisions of the NPR regarding professional mediation services with respect to certain passenger rail matters under Title XI of the FAST Act.

³ Currently, Amtrak is the only operator of regularly scheduled, common carrier intercity passenger rail service in the United States. Certain statutory provisions contemplate the possibility, in the future, of other such intercity passenger rail operators. See, e.g., 49 U.S.C. § 24711 & 49 U.S.C. § 24308(f).

⁴ See 49 C.F.R. § 1100.1 (limiting the scope of the Rules of Practice to matters under title 49, subtitle IV of the United States Code, 49 U.S.C. § 10101 et seq.).

FAST Act Provisions

The State-Supported Route Committee. Section 11204 of the FAST Act adds a new section to the United States Code: 49 U.S.C. § 24712, “State supported routes operated by Amtrak.” State-supported routes are intercity rail passenger routes for which operating and capital costs are established and allocated among the states and Amtrak under section 209 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA).⁵ Under these agreements, Amtrak currently receives funding from states and state-related entities to operate routes under 750 miles in length. New § 24712 establishes a State-Supported Route Committee comprised of Amtrak, the U.S. Department of Transportation/Federal Railroad Administration, and states that subsidize state-supported routes, to implement the cost-allocation methodology previously developed under section 209 of PRIIA through negotiation between Amtrak and the affected states and approved by the Board. See Amtrak’s Pet. for Determination of PRIIA Sec. 209 Cost Methodology, FD 35571 (STB served Mar. 15, 2012). The Committee may also amend that cost-allocation methodology. Section 24712(c)(1) gives the Board jurisdiction to “conduct dispute resolution” pertaining to (1) the Committee’s rules and procedures, (2) the invoices to be produced by Amtrak or reports to be produced by Amtrak or the states as described in § 24712(b), and (3) the implementation of or compliance with the cost allocation methodology. Section 24712(c)(2) requires the Board to establish procedures for resolving such disputes, which procedures “may include provision of professional mediation services.”

The Northeast Corridor Commission. Section 11305 of the FAST Act, which amends 49 U.S.C. § 24905, involves the powers and obligations of the Northeast Corridor Commission (NEC Commission), created by Congress in 2008 as part of PRIIA.⁶ The NEC Commission is responsible for developing and implementing a standardized policy for determining and allocating costs, revenues, and compensation between Amtrak and the providers of commuter rail passenger transportation on the Northeast Corridor. The FAST Act amends 49 U.S.C. § 24905 with respect to the Board’s role in resolving disputes between Amtrak and the states in determining compensation for use of the Northeast Corridor in light of the policy approved by the NEC Commission. Under the new subsection, 49 U.S.C. § 24905(c)(4), the FAST Act permits the NEC Commission, Amtrak, or public authorities providing commuter rail passenger transportation on the Northeast Corridor to request that the Board conduct dispute resolution if a dispute arises over implementation of, or compliance with, the NEC Commission’s cost allocation policy. The new subsection requires the Board to establish procedures for resolving

⁵ Public Law 110-432, Section 209; 49 U.S.C. § 24101 note.

⁶ The NEC Commission was originally established as the Northeast Corridor Infrastructure and Operations Advisory Commission. See 49 U.S.C. § 24905. It is composed of voting representatives from Amtrak, the U.S. Department of Transportation, and the states comprising the Northeast Corridor (including the District of Columbia).

such disputes and provides that those procedures “may include the provision of professional mediation services.”

Comments

The Board sought comments on the proposed regulations by August 31, 2016, and replies by September 30, 2016. The Board received comments from six parties: California Department of Transportation (Caltrans), Los Angeles-San Diego-San Luis Obispo Rail Corridor Agency (LOSSAN Agency), Amtrak, U.S. Department of Transportation (DOT), San Joaquin Joint Powers Authority (SJJPA), and Capitol Corridor Joint Powers Authority (CCJPA). Amtrak filed a reply.

Caltrans, LOSSAN Agency, SJJPA, and CCJPA (California Entities) all assert that the NPR did not meet the intent and requirement of the FAST Act. They state that the proposed mediation regulation is non-binding and that in order to efficiently resolve disputes, parties should have recourse to a binding mechanism for resolving such disputes. The California Entities suggest that the Board adopt binding arbitration, either before the Board or a third-party arbitrator, as the dispute resolution procedures required under § 24712. They further propose that arbitration be mandatory and that the Board compel arbitration upon request from a State or Amtrak. Lastly, the California Entities suggest that the Board clarify the proposed mediation regulation to address whether the Board will: (1) maintain a list of mediators; (2) intervene if parties cannot agree to a mediator; (3) establish terms for payment of mediation services; and (4) require parties to participate in mediation.

In its initial comments, Amtrak supports the proposed rule and suggest two clarifications. First, Amtrak asserts that the proposed 49 C.F.R. § 1109.5 is ambiguous as to whether the Board’s existing mediation rules apply to formally contested matters involving the State-Supported Route Committee (section 209 of PRIIA) or the Northeast Corridor Commission (section 212 of PRIIA). Amtrak suggests adding language which explicitly states, “mediation procedures under [49 C.F.R. §§] 1109.1, 1109.2, and 1109.3 are applicable” to disputes arising under sections 209 or 212 of PRIIA. Second, Amtrak proposes that the Board clarify and expand the procedures following the filing of a request with OPAGAC for securing professional mediation assistance.

In its reply comments, Amtrak responded to the California Entities’ requests for the Board to adopt binding arbitration. Amtrak states that arbitration is a voluntary alternate dispute mechanism and that nothing in the FAST Act suggests that the Board should impose arbitration on unwilling parties. Amtrak also argues that the FAST Act does not authorize the Board to delegate its decision-making power to a third-party arbitrator. Lastly, Amtrak argues that binding arbitration is not the best tool for resolving recurring issues in which uniformity among multiple parties is needed.

The Final Rules

After considering the comments received, the Board is adopting final rules, as set forth in the Appendix, for the mediation of passenger rail disputes involving the State-Sponsored Route Committee or the Northeast Corridor Commission. Formal disputes under 49 U.S.C. §§ 24712 and 24905 would be conducted using the Board’s existing Rules of Practice as a guide. Parties interested in professional mediation services could seek the Board’s informal assistance in securing such services by submitting a letter to OPAGAC. Such informal assistance may be sought even if no party has filed a formal complaint with the Board.

The Board does not agree with the California Entities that § 11204 of the FAST Act authorizes or requires the Board to resolve PRIIA section 209 disputes through binding arbitration. (Neither does any such authorization or requirement appear in FAST Act section 11305, with regard to PRIIA section 212.) While the FAST Act specifically mentions professional mediation services, it does not state or otherwise suggest the use of arbitration as a potential dispute resolution procedure. Further, as Amtrak points out, parties have to agree on arbitration as the method to resolve their disputes. Therefore, provisions for binding arbitration will not be included as part of the regulations adopted here.

CCJPA argues that the plain language of the FAST Act contemplates a more significant role for the Board than providing informal assistance in securing outside professional mediation services—specifically, that the statute contemplates “dispute resolution” by the Board itself. (CCJPA Comments 2.) To the extent that CCJPA is arguing that the Board should be involved in “dispute resolution” by issuing decisions on disputes arising under the FAST Act, as noted above, parties may bring contested matters under §§ 11204 or 11305 of the FAST Act before the Board, guided by the Board’s existing Rules of Practice. See, e.g., Pet. of the Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905, FD 36048 (STB served Oct. 3, 2016). Alternatively, if CCJPA believes that the Board should engage in dispute resolution by conducting mediation itself and not simply relying on outside professional mediators, as discussed further below, the new rules provide that in cases where a formal complaint is brought under sections 209 or 212 of PRIIA, the Board’s existing rules under Part 1109 for mediation in Board proceedings would apply.

The California Entities have asked that the Board clarify the proposed rule to address questions about choosing professional mediators, payment of mediation services, and whether participation in mediation would be mandatory. (Caltrans Comments 1; CCJPA Comments 3; SJJPA Comments 2; LOSSAN Agency Comments 2.) Similarly, Amtrak proposes expanding 49 C.F.R. § 1109.5 to include specifics such as timing and means of service of the requesting letter on all affected parties, whether parties must consent, the purpose for which OPAGAC will contact the requesting party, and whether and how OPAGAC will contact other affected parties. However, as these rules are intended to provide guidance for informal requests, in which parties and OPAGAC retain maximal flexibility in arranging for professional mediation, the Board believes that these issues should not be codified in regulations but left in the first instance to

discussions between OPAGAC and the requesting party or parties, following receipt of a request. Accordingly, the Board will not adopt commenters' suggestions to address such specifics.

Amtrak also asks that the rules clarify whether the Board's existing mediation rules apply to contested matters under section 209 or 212 of PRIIA. The Board's proposed rule contemplated that the existing, applicable mediation procedures under 49 C.F.R. Part 1109⁷ would be available in formal complaint cases brought under sections 209 or 212 of PRIIA. See § 1109.5(a) & (b) (noting that requests for assistance in securing professional mediation services are "[i]n addition to the mediation procedures under this Part 1109 *that are available* following the filing of a complaint . . .") (emphasis added). We reiterate here that, in cases where a formal complaint is brought under sections 209 or 212 of PRIIA, the preexisting mediation rules under Part 1109 shall apply.

In asking for this last clarification, Amtrak states that there may be ambiguity with respect to whether the current provisions of Part 1109 apply in a contested matter under PRIIA because Part 1109 deals with mediation *after* the filing of a complaint. It is the Board's intention that an informal request for assistance in securing professional mediation services be available not only in instances where there has not been a formal complaint filed, but also during the pendency of a formal complaint case—as long as a motion is filed in that formal proceeding requesting that it be held in abeyance in light of the request for informal assistance. Thus, we have modified the rules proposed in the NPR to include this clarification. See § 1109.5(a) & (b).

Paperwork Reduction Act.

In the NPR, the Board sought comments under the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3549, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3). No comments addressing PRA issues were received. Due to a technical omission in the NPR under the PRA, the Board will continue to seek OMB approval for this collection in a separate notice. Any comments received by the Board from that notice will be forwarded to OMB for its review and will be posted under this docket.

Regulatory Flexibility Act Certification.

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the

⁷ Rather than identifying each individual subsection, this language encompasses the existing procedures available to parties after the filing of a complaint in §§ 1109.1, 1109.2, and 1109.3. The mediation rules for rate cases under the stand-alone cost methodology (49 C.F.R. § 1109.4) are inapplicable here.

effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment.

5 U.S.C. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities." § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

In the NPR, the Board certified under 5 U.S.C. § 605(b) that the proposed rules would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.⁸ The Board explained that the proposed regulations would specify procedures related to dispute resolution of certain passenger rail transportation matters by the Board and do not mandate or circumscribe the conduct of small entities. The Board further noted that if a party wishing to utilize the proposed procedures files a complaint, petition, application, or request for dispute resolution, that entity will not encounter any additional burden and that, rather, the procedures are being updated and clarified by the regulations. The NPR was served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

The final rules adopted here make slight modifications to the proposed rule, but the same basis for the Board's certification of the proposed rule applies to the final rules adopted here. The modification adopted in the final rule refines the proposed rule by clarifying the circumstances under which the informal process for seeking Board assistance in pursuing professional mediation services will be available. Therefore, the Board certifies under 5 U.S.C. § 605(b) that this rule will not have a significant economic impact on a substantial number of small entities as defined by the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

⁸ Effective June 30, 2016, for the purpose of RFA analysis for rail carriers subject to our jurisdiction, the Board defines a "small business" as a rail carrier classified as a Class III rail carrier under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Commissioner Begeman dissenting). Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars, or \$36,633,119 or less when adjusted for inflation using 2015 data. Class II rail carriers have annual operating revenues of up to \$250 million in 1991 dollars or up to \$457,913,997 when adjusted for inflation using 2015 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 C.F.R. § 1201.1-1.

List of Subjects

49 C.F.R. Part 1109

Administrative practice and procedure, maritime carriers, motor carriers, railroads.

It is ordered:

1. The Board adopts the final rules as set forth in this decision. Notice of the adopted rules will be published in the Federal Register.
2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.
3. This decision is effective December 29, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

APPENDIX

For the reasons set forth in the preamble, the Surface Transportation Board amends part 1109 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1109—USE OF MEDIATION IN BOARD PROCEEDINGS

1. Revise the authority citation for part 1109 to read as follows:

Authority: 5 U.S.C. 571 et seq. and 49 U.S.C. 1321(a), 24712(c), and 24905(c).

2. Add 1109.5 as follows:

§ 1109.5 Resolution of certain disputes involving the State Sponsored Route Committee and the Northeast Corridor Commission.

(a) In addition to the mediation procedures under this Part 1109 that are available following the filing of a complaint in a proceeding before the Board, Amtrak or a State member of the State Supported Route Committee established under 49 U.S.C. 24712 may request that the Board informally assist in securing outside professional mediation services in order to resolve disputes arising from:

(1) implementation of, or compliance with, the cost allocation methodology for State-Supported Routes developed under section 209 of the Passenger Rail Investment and Improvement Act of 2008 or amended under 49 U.S.C. 24712(a)(6);

(2) invoices or reports provided under 49 U.S.C. 24712(b); or

(3) rules and procedures implemented by the State Supported Route Committee under 49 U.S.C. 24712(a)(4).

With respect to a particular dispute, such a request for informal assistance in securing outside professional mediation services may be submitted to the Board (i) in the absence of a complaint proceeding before the Board, or (ii) if, while a formal complaint is pending before the Board, a motion is filed in that formal proceeding requesting that it be held in abeyance in light of the request for informal assistance.

(b) In addition to the mediation procedures under this Part 1109 that are available following the filing of a complaint in a proceeding before the Board, the Northeast Corridor Commission established under 49 U.S.C. 24905, Amtrak, or public authorities providing commuter rail passenger transportation on the Northeast Corridor may request that the Board informally assist in securing outside professional mediation services in order to resolve disputes involving

implementation of, or compliance with, the policy developed under 49 U.S.C. 24905(c)(1). With respect to a particular dispute, such a request for informal assistance in securing outside professional mediation services may be submitted to the Board (i) in the absence of a complaint proceeding before the Board, or (ii) if, while a formal complaint is pending before the Board, a motion is filed in that formal proceeding requesting that it be held in abeyance in light of the request for informal assistance.

(c) A request for informal Board assistance in securing outside professional mediation services under subsection (a) or (b) of this section shall be submitted by letter duly authorized to be submitted to the Board by the requesting party. The request letter shall be addressed to the Director of the Board's Office of Public Assistance, Governmental Affairs, and Compliance, and shall include a concise description of the issues for which outside professional mediation services are sought. The Office of Public Assistance, Governmental Affairs, and Compliance shall contact the requesting party in response to such request within 14 days of receipt of the request.